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Supreme Court of the United States

October Term, 1966
No. 3

ROBERT REDRUP,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Judicial Department.

No. 16

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

Petitioners' Reply to Briefs Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondents.

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An organization known as the Citizens for Decent Literature, Inc., by its counsel, Charles H. Keating, Jr., James J. Clancy and Ray T. Dreher, has submit-

ted briefs *amicus curiae* in support of respondents in the above entitled causes. Insofar as these briefs purport to discuss the legal and constitutional issues involved in these proceedings, petitioners believe it appropriate to refer the Court to the briefs of the parties in the two causes, and the oral argument which will be made thereon.

Since, however, the Citizens for Decent Literature, Inc., known commonly as "CDL", has sought in its briefs to generate "hydraulic pressures" by appeal to such emotionally charged slogans as "the public interest in good public morality relating to the sex function" (Redrup Br. 16; Austin Br. 23), by distortions of the governing law (Redrup Br. 24; Austin Br. 34-35; see, California Penal Code §311(e); Stats. 1961, c. 2147, p. 4427, §6), and by broad reference to and reliance upon oral and documentary material *dehors* the record, some comment by petitioners upon the aims and objectives of CDL and similar organizations, appears required.

1. As petitioners understand the involved and obscure arguments of CDL, it would appear that the organization is requesting this Court to enunciate principles with respect to the question of scienter in obscenity prosecutions which will reduce this element of the offense to such ineffectiveness as to virtually eliminate the requirement of proof of scienter. Using such phrases as "recklessness", "negligence", "reasonable belief", "knowledge of contents", "character", and other terms of a like nature, the argument of CDL comes

down to this: that scienter means no more than proof, directly or indirectly, that a publisher, distributor or retailer knew that a book or magazine had a cover which by depiction or representation contained some connotation of sex. Photographs of covers of books and magazines which CLD has inserted in each of its briefs *amicus curiae* make this point abundantly clear. This Court is asked, in disregard of the First Amendment and the Constitution, to place the balance on the side of "The Paramount Right of Government to Regulate Matters Relating to Sexual Morality". (Redrup Br. 36; Austin Br. 51).

It is the position of petitioners that the public statements of CDL reveal more explicitly than can ordinarily be presented within a legal framework the true intent and purpose of those who favor the censorship of books and other media of communication. That purpose and objective is so to loosen the standards for judging obscenity as to permit the broadest suppression of all publications which this organization, and related censorial groups, deem objectionable. The standards of this organization, therefore, become of critical importance. What is it that the CDL wants to suppress? What are the criteria for suppression? What are the methods which the organization employs in accomplishing its aims and objectives? Petitioners think it best to let the CDL speak for itself.

The CDL publishes a Newsletter entitled "The National Decency Reporter", a monthly publication, which

is distributed nationally at a subscription rate of $5.00 per year. Its editorial department includes Charles H. Keating, Jr., Founder and Director of the Citizens for Decent Literature, Inc. "The National Decency Reporter" of December 1, 1963, Vol. I, No. 4, contains on its cover the following matter:

"'SHOW ME WHAT HE READS, AND I'LL TELL YOU WHAT HE IS.'"

"'I'M A MARXIST,' he said seriously. 'I BECAME INTERESTED ABOUT THE AGE OF 15. AN OLD LADY HANDED ME A PAMPHLET ABOUT SAVING THE ROSENBERGS.' (Julius and Ethel Rosenberg were executed as Communist spies.) — LEE HARVEY OSWALD.

"CITIZENS FOR DECENT LITERATURE, INC.

3701 Carew Tower Cincinnati 2, Ohio

"From the desk of
CHARLES H. KEATING, JR.

[Hand-written]

"Cincinnati, Ohio
December 1, 1963

"Dear Friends of Decency,

"I share your grief that this civilized nation has lost its President by assassination.

"The slayer is a product of Communism. His home was reported filled with Communist propaganda and texts. Other reading indicated a propensity for sex and violence stories. Oswald was typical of the aethistic [sic], materialistic system

of Communism which disregards the worth of man and denies the existence of God.

"Oswald was also an example of the old adage 'Show me what he reads, and I'll tell you what he is!' Whether it is Communist propaganda or obscenity, reading and 'pouring [sic] over' such material deprives individuals of right reason and reduces men from rational beings to animals.

"We hope the Supreme Court of the United States can be brought to this realization.

"Sincerely,

Charles H. Keating, Jr.

"OSWALD'S SLAYER, RUBY, A DESPICABLE MAN WHOSE TRADE IS FLESH, IS NO LESS REPRESENTATIVE OF OUR PRESENT PLIGHT BROUGHT ON IN SUBSTANTIAL MEASURE BY UNREALISTIC JUDICIAL APPROACH AND RULING WITH RESPECT TO IMMORALITY AND DECADENCE."

In 1954, Professors Lockhart and McClure, in their article "Literature, The Law of Obscenity and the Constitution," 38 Minn. L. Rev. 295, analyzed in detail the forces and methods involved in the censorship of books, magazines and other communications (*Id.* at 302-320). Describing the activities of these censorial groups, the authors concluded with respect to the persons who engaged in such censorial activities (*Id.* at 320):

". . . Often an emotionally disturbed person, he sets out to look for smut and consequently finds

it almost everywhere, oblivious of the context and the values of the book in which he finds what he seeks. His one-track interest often is reinforced when his smut-snuffling becomes a professional occupation. Surely, Heywood Broun was far from wrong in observing that '[o]nce censorship is let loose, nothing is safe from the smirch of its exceeding dirtiness.' "

In 1960, Professor Lockhart and McClure, in their article entitled "Censorship of Obscenity: The Developing Constitutional Standards", 45 Minn. L. Rev. 5, 9-11, made the following comment:

"With the retreat of the NODL and the decline in the systematic use of lists of proscribed publications came a new type of organization and a sharp increase in the practice of abruptly prosecuting news dealers on criminal charges without forewarning.

"The new type of organization began with the formation of Citizens for Decent Literature in Cincinnati, Ohio. Carefully avoiding the much-criticized practices of the NODL, CDL counsels against telling any dealer what not to sell. Instead, CDL limits its operations to stirring up public agitation against magazines thought to be obscene, and to encouraging and assisting law enforcement officials in the prosecution of obscenity cases. Encouraged by a number of successful prosecutions of wholesale and retail news dealers in Cincinnati, interested individuals in other Ohio cities formed similar local organizations. In 1958 a statewide organization was formed, and it was not long before similar groups began to spring up in

other parts of the country. A national organization was formed in February, 1960. So far, the only serious criticism leveled at the CDL has centered on its organized campaigns to write letters to judges who have obscenity cases pending before them.

"Perhaps as a result of the encouragement given to them by CDL groups, law enforcement officials all over the country increasingly resorted to swift police raids, followed by arrest and criminal prosecution for selling obscene publications. For example, last year in Indianapolis, Indiana, city police and sheriff's deputies raided 16 drug stores, a wholesale news dealer's warehouse, a variety store, and a book store, seizing 1,500 copies of more than 70 magazines. The manager of the wholesale news business, the manager of a chain of drug stores, and 19 retailers were arrested and charged with selling such allegedly 'obscene' publications as Playboy, National Enquirer, Police Gazette, and Tempo. After the arrests some of the retailers closed out their magazine departments. As might be expected, the local CDL group supported the raids and arrests.

"Criminal prosecutions have an enormous impact upon retail and wholesale news dealers—reputable businessmen in their communities. The embarrassment and shame of being charged with the crime of selling obscene literature, added to the trouble and expense of defending against criminal action, are enough to terrify dealers in any community in which the practice of criminal prosecution without forewarning has been employed. In Cleveland, we are informed, only one rather ob-

> scure book dealer has dared to stock the Kronhausens' Pornography and the Law, a serious effort to define matter that may constitutionally be censored as obscene. And in Cincinnati the climate is such that the public library director refused to accept a copy of Vladimir Nabokov's Lolita, even as a gift to the library. Perhaps the severe impact of criminal prosecution, radiating far beyond the particular books and magazines upon which successful prosecutions have been based, explains in part why law enforcement officials have made relatively little use of the injunctive and book libel proceedings that are available to them in many states."

Concurring in *A Book etc. v. Attorney General of Massachusetts*, 383 U.S. 413, 86 S. Ct. 975, 982, Justice Douglas stated:

> "Every time an obscenity case is to be argued here, my office is flooded with letters and postal cards urging me to protect the community or the Nation by striking down the publication. The messages are often identical even down to commas and semicolons. The inference is irresistible that they were all copied from a school or church blackboard. Dozens of postal cards often are mailed from the same precinct. The drives are incessant and the pressures are great. . . ."

The Citizens for Decent Literature, Inc. also publishes "The Vanguard", described as "Young Adults Newsletter," which is also nationally distributed. The March 1964 issue of "The Vanguard", Vol. II, No. 7, purports to deal with "Effective Letter-Writing."

Among the instructions contained in the publication were the following:

"TO PROSECUTORS:

IDEAS TO GET ACROSS:

"(1) Compliment them for efforts in the past to control and prosecute obscenity.

"(2) Express concern over flood of newsstand filth which is in violation of existing local, state, and national laws.

"(3) Insist that our community standards are higher than the 'dominant theme' of many books available on our newsstands.

"(4) Urge that public opinion is in support of prosecution even though it is not always openly voiced.

"(5) Make reference to successful prosecution in other areas, e.g. in Ohio due to CDL efforts.

"SAMPLE letters or postcards to Prosecutor of town and county, State, and U.S. Attorney General:

"'As a citizen (mother, father, youth, businessman, etc.) of (name of city), I was recently shocked when someone showed me certain magazines available on our newsstands. It is difficult to understand how so many people are so concerned about the effects of cigarettes, alcohol, and narcotics on our youth and yet are unaware of the menace of obscene literature which inevitably falls into the hands of youth.'

"'I am convinced that many magazines available locally on our newsstands violate the local and

state laws against obscenity. Unfortunately, your efforts are not supported by a tide of articulate public opinion when you go into court to prosecute the muck merchants. I really believe our local and even national standards are considerably above many of the books and magazines available even though most people don't go to the trouble of expressing their opinion.'

"TO ELECTED OFFICIALS:

IDEAS TO BE EXPRESSED:

"(1) They are elected officials, responsible for the interests of the citizens.

"(2) We feel they are not sufficiently aware or concerned about the obscenity problem.

"(3) Mayors and Governors—should make every effort to prod the legislative branch to pass adequate legislation and to prod the judiciary to prosecute offenders.

"Senators and Congressman—State and U.S.—should study laws to see if they need strengthening and clarification to plug loopholes. Bills similar to ones already enacted in other states (and enforced) should be promptly introduced and passed. Special legislation protecting youth (as in New York) should be enacted swiftly.

"(4) Aid to education, delinquency studies, housing developments, urban renewal, and the solution of the race problem are short-sighted goals, if the character, mind, and morals of our youth are allowed to be constantly assaulted, eroded, and corrupted by obscenity.

"SAMPLE letter or postcard to elected official:

"'I realize that in a democracy, freedom of speech and the press is and must be an "article of secular faith." But isn't the flood of obscenity displayed on our newsstands ample proof that freedom has become license and that absolute liberty for a small minority is resulting in moral enslavement for the majority? As mayor (senator, congressman, governor, etc.) of our town (state), we have elected you to promote suitable legislation and enforce prosecution involving this matter. I beg you to take action swiftly.

"TO STATE SUPREME COURT JUSTICES: IDEAS TO BE EXPRESSED:

"(1) We are thoroughly familiar with the U.S. Supreme Court's 1957 'Roth' decision. ('Whether to the average person, applying contemporary COMMUNITY standards, the dominant theme, taken as a whole, appeals to the prurient interest.')

"(2) We feel that 'community' does not mean 'national' or even national community average.

"(3) If national standards are the yardstick, how can a local jury (except one of psychologists, publishers, lawyers, educators, sociologists, etc.) determine what precisely the standards are?

"(4) We feel that in effect 'national' standards would end up as the lowest or near lowest of all U.S. communities, e.g. slums of great cities.

"(5) We know that other statutes have secured convictions on the basis of local community standards in accord with local ordinances.

"SAMPLE letter or postcard to New Jersey State Supreme Court Justices on a particular issue:

"'Perhaps the average person in Hudson County or in any New Jersey community isn't as articulate as he should be in voicing his opinion about the flood of obscene materials. Most people I know agree with me that obscene books are readily available and that we local citizens should have the right to set our own standards of decency. We feel that if you had polled public opinion you would not have reversed the conviction of Hudson County News because of the national v. community standards issue. Are we to be measured in Hudson County by 42nd Street, New York City, or by the slums of Chicago? How does one arrive at an average of all U.S. communities?'"

In "The Vanguard" of January 1964, Vol. II, No. 5, there appears an editorial by Charles H. Keating, Jr. entitled "WHAT ABOUT PLAYBOY MAGAZINE". The article reads as follows:

"Many of the youth of today, particularly the young men, read Playboy magazine. Most young persons have seen it on occasion. Very few escape its presence in the thoughts, words, or actions of their contemporaries.

"In the content of the magazine and in the laborious Playboy Philosophy, the doctrine comes through to me as being diametrically opposed to the basic Judeo-Christian principles of Western Civilization. The opposition is to those principles which have given creativity, strength, and stability to our nation—the leader of Western man and of the peo-

ple who have reached the highest peak of civilization yet known.

"It seems to me that Playboy's philosophy is not a mere dormant or academic opposition to morality, right reason, and common sense, but an activating proposition which, in fact, violently works toward the overthrow of the bases of our society. For example, it seems apparent in the philosophy that women are reduced to playthings for men—something to be used and discarded. The emergent and emancipated female in the practicalities of the philosophy loses the exalted status which morality, integrity, sacrifice, and valiant endeavor have brought her, as she is relegated to an animalistic state, with total emphasis on her physical contribution to the gratification of the lust and desire of men—and perhaps a bit of the evident tendency of some modern women to masochistic delight is also involved.

"And shall we speak for a moment of freedom? It must be obvious that this philosophy is one which enslaves to lust and prurient interest, one which destroys moral integrity and spirituality. It is a philosophy—a creed if you will—inimical to freedom.

"And since this is a paper for youth, let me say that it is my opinion that very few, if any, young people can dwell on Playboy magazine without committing sin. Sin is a personal affront to God. It is an insult—a spit in the face to your Creator, your Redeemer, and your Judge.

"Sin is not an old-fashioned concept. It is an omni-present reality—an eternal proposition which

in justice requires punishment. While I think the idea of punishment, especially regarding youth, can be overdone, it can never be ignored. Hell, for example, was created for and exists to punish. Someone once accused me of saying that 'everyone was going to hell in a handbasket.' I have never said this, but it is an appropriate thought which should give caution to all of those who succumb to the temptation and expose themselves or others to immorality, licentiousness, and lewdness.

"Will you allow me (who because of this article will be ridiculed and derided) to suggest that there is tremendous good in the world, in literature, in poetry, in pictures, etc., and developing an affinity for goodness, truth, and beauty is that which provides joy, happiness, right reason, and stability. It is my judgment that Playboy is the opposite of good and will bring you the opposite results."

In July 1964, "The National Decency Reporter", Vol. I, No. 12, contained on its cover page "A LETTER FROM THE EDITOR TO ALL CITIZENS FOR DECENT LITERATURE". Among other things the letter stated:

"I have just spoken with a heartsick father who found his son, a high school junior, pouring over some magazines which were going the rounds in the boy's class. The magazines which I have in front of me are *Naughty Nylons, Mood, Monsieur, Caper, Jem, Modern Man,* and *Man's Favorite Pastime.* The magazines, in my opinion, are nauseating and depraved—capable of poisoning any mind at any age.

* * *

"'I can only assume that the Supreme Court of the United States, who is loosing [sic.] this flood of filth upon each and all of us, is unaware of what its decisions as a Supreme Board of Censors are doing to American morality.

"If this assumption is wrong and they are aware of the nature and extent of obscenity in this country today, then with a prayer for their souls, I think that each and everyone of us should work irrevocably that those of the Justices who have unleashed this demon of obscenity from the pits of Hell be removed or controlled.

* * *

"If the Court wants to act as a Supreme Board of Censors, let them. Let them, however, know that communities across the length and breadth of this land are not going to swallow the depravity that is currently on the newsstands; and you can do this by insisting to local officials that they arrest and prosecute obscenity peddlers wherever and whenever they are found.

"If the Supreme Court, at its level, wants to reverse the convictions, the effect of many prosecutions will, nevertheless, be felt.

* * *

The Citizens for Decent Literature, Inc., and its officers are entitled to enunciate whatever standards they please for the reading or viewing of books, magazines or other media of communication by their members. They are not entitled however, it is submitted, to encourage the lawless suppression of material, or to impose their religious or secular views upon the community at large. The intemperate attitude which the or-

ganization expresses for courts sworn to defend the Constitution and all the principles embodied therein, and the unseemly pressure methods which are employed, give ominous warning of the large-scale suppression and book-burning which these extra-legal groups contemplate if the standards for judging obscenity and scienter are loosened. "Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity." *United States v. Klaw*, 350 F.2d 155, 170 (2 Cir. 1965).

2. The desire of CDL to reduce the question of scienter in obscenity prosecutions to mere knowledge of the contents of the covers of books and magazines is, of course, understandable in the light of its professed objective. The standard which CDL proposes is the equivalent of a simplistic method of wholesale suppression of books and magazines in all the book stores and newsstands throughout the country, together with an overwhelming tide of criminal prosecutions in every local community. The standard is intended to facilitate the extra-legal activities of censorial groups and encourage the arbitrary actions of police officers and prosecutors.

The photographs of covers of books and magazines which CDL has annexed to its briefs *amicus* do not, it is submitted, support its position. In the first place, these covers do not substantially exceed in depiction of sex or nudity the covers which are contained in literally thousands of other books and magazines, including men's and women's magazines which are in general family circulation as well as writings which have been authored by Nobel Prize and Pulitzer Prize winners and other authors of literary distinction. It cannot be claimed, therefore, that these covers are in any way ob-

scene within the constitutional standards for judging obscenity.

In the second place, it is equally clear that one cannot tell a book from its cover. In short, no rational inference can be drawn from viewing the cover of a book or magazine that the contents of such book or magazine goes substantially beyond contemporary community standards, appeals to the prurient interest and is utterly without redeeming social importance.

Again, petitioners exemplify these arguments from material contained in the CDL briefs.

In one of the set of photographs attached to the CDL brief *amicus* in *Redrup* herein [see photographs, p. 7], there is reference to the case of "U.S. v. Hamling et al Houston, Texas Indictments, Sept. 11, 1965". This particular case was a prosecution which was brought under the multi-venue federal obscenity statute in Houston, Texas against California residents involving seven paperback books under a 26-count indictment (*United States v. Hamling, et al.*, United States District Court for the Southern District of Texas, Houston Division, CR. No. 65-H-172). It is important to note that after a six-week trial, the jury was unable to reach an agreement and a mistrial was declared, a conclusion known to *amicus* but which is left unmentioned in its briefs. During the course of the trial, the witnesses on behalf of the Government, the retailers of the books involved, testified with respect to the paperback books and other writings which they received from established publishing companies, such as Signet Books, Pocketbooks, Inc., Lancer, Beacon Publishing Co., Kable, Gold Medal, Monarch, Popular Li-

brary, and Grove Press [Rep. Tr. 34-40]. The testimony of these Government witnesses ran as follows:

"Q. All right. Now, it is a fact, Mr. Milburn, that over the five or six year period that you have been in your place of business that you have re-received literally thousands of paperback books which have covers on them entirely similar to the covers on the seven books involved in this case?

"A. Definitely, sir.

* * *

"Q. Isn't it a fact, Mr. Malone, that virtually every publisher puts out material that deals candidly with sex, so far as one can tell from the covers?

"A. Not only books, but all your magazines.

"Q. And all of these books that appear to deal with sex which you put in your adult section, is that the fact?

"A. Yes, sir.

* * *

"Q. Isn't it the fact, Mr. Malone, that over the period of time that the FBI was collecting Reed books, you received literallly thousands of books from, literally thousands of publications that had covers and contents similar to those before you?

"A. Yes, sir.

* * *

"Q. It's a fact, is it not, that virtually every publisher and every distributor has a line of books which are appealing to a sexual interest, isn't that the fact?

"A. Yes, sir." [Rep. Tr. 40, 69-70, 76, 120].

Commenting upon the mistrial in the *Houston* case, the Houston Chronicle (Sept. 5, 1966, p. 2, sec. 6), stated in an editorial as follows:

"A mistrial probably was the logical end to the long court dispute over obscene books. Take any 12 representative Americans and they're not likely to agree on what constitutes obscenity. Even the U.S. Supreme Court can't agree on that.

"This inability to define obscenity is a very good reason for government to proceed cautiously in trying to tell a free people what it can and cannot read. The best solution, as U.S. Judge Joe Ingraham suggested, may be to leave it to the individual and hope that education and cultivation of better tastes will provide a satisfactory answer.

"This was a good trial—that is, a fair one in which jurors were exposed to valid arguments on both sides of the controversy. It centered on seven individuals and three firms whom the Justice Department charged with shipping obscene books across state lines. Counsel on both sides argued persuasively. The trial lasted six weeks and cost the government an estimated $100,000. The jurors deliberated nine long days before deciding they were hopelessly deadlocked and unable to reach unamimous agreement.

"Judge Ingraham spoke wisely, we think, when he advised federal prosecutors to 'take a long, hard look' at their evidence before proceeding with a new trial. He said 'there were many times during the trial that I thought, "Is it worth it?" Obscenity is in a gray area of the law. Some of it is blackish and some whitish, but none of it is black or white.'

"Citizens who have followed this trial are likely to share the judge's doubts. Most will agree that society, acting through representative government, does have the right to prohibit certain offensive types of literature. That was not the issue here. Where the going gets tough is in deciding just where to draw the line. Should the view of the least tolerant prevail, many citizens would find themselves deprived of their right to decide certain things for themselves. Through the ages, man's record of book-burning and censorship is not good.

"When society cannot arrive at a substantial agreement on obscenity—and we think the jury deadlock accurately reflects the broader view—then it is better to take no action at all."

In *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 489-491, Justice Harlan stated:

". . . Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene.' Divorced from their 'prurient interest' appeal to the unfortunate persons whose patronage they were aimed at capturing (a separate issue), these portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates. Of course not every portrayal of male or female nudity is obscene. See Parmelee v. United States, 72 App.D.C. 203, 206-208, 113 F.2d 729, 732-734; Sunshine Book Co. v. Summerfield, 355 U.S.372, 78 S.Ct.365, 2 L.

> Ed. 2d 352; Mounce v. United States, 355 U.S. 180, 78 S.Ct. 267, 2 L.Ed.2d 187. Were we to hold that these magazines, although they do not transcend the prevailing bounds of decency, may be denied access to the mails by such undifferentiated legislation as that before us, we would be ignoring the admonition that 'the door * * * into this area [the First Amendment] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests'. . . ."

It is submitted therefore that it offends both logic and law to argue that guilty knowledge and unlawful intent in an obscenity prosecution is established by mere proof of knowledge of the cover of a book or a magazine by either a retailer, distributor or publisher. As Justice Douglas observed in *Ginzburg* and *Mishkin:*

> "The use of sex symbols to sell literature, today condemned by the Court, engrafts another exception on First Amendment rights that is as unwarranted as the judge-made exception concerning obscenity. This new exception condemns an advertising technique as old as history. The advertisements of our best magazines are chockfull of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyers' attention to lotions, tires, food, liquor, clothing, autos, and even insurance policies. . . ." (86 S. Ct. at 969.)

Conclusion.

In a democracy, liberty of the press is essential. Especially is this true in a self-governing society where faith is placed in the people themselves to reach the truth in the marketplace of ideas. This Court has held that there is a limitation upon the exercise of freedom of the press, and that limitation is "obscenity". This Court has stated, however, that the standards for judging obscenity are strict and must be strictly confined. The same viewpoint, it is submitted, must exist with respect to the issue of "scienter" in obscenity prosecutions.

If the position advocated by CDL and by respondents in these causes is adopted, a constitutional requirement of proof of scienter will, it is submitted, become a cloak for, instead of a safeguard against, the destruction of a free press. Without free speech and a free press, a democracy can hardly survive and we should avoid such an end, it is submitted, by preventing the destruction of these liberties at the beginning.

Respectfully submitted,

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